Supreme Court, U.S.
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No.

IN THE

# SUPREME COURT OF THE UNITED STATES

WILBUR H. FRIEDMAN, JR.,

*Petitioner,*

*v.*

MARYLAND INSURANCE ADMINISTRATION, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF SPECIAL APPEALS OF MARYLAND

## PETITION FOR A WRIT OF CERTIORARI

WILBUR H. FRIEDMAN, JR.
16303 Spring Water Court
Rockville, Maryland
20853-3210
(301) 260-8283
*Petitioner Pro Se.*

Washington, D.C. • THIEL PRESS • (202) 328-3288

## QUESTIONS PRESENTED FOR REVIEW

1. Whether Maryland Rule 1-104, Unreported Opinions, is, on its face or in its application here, a denial of due process and equal protection.

2. Whether a rule of the Maryland Insurance Administration, COMAR 31.02.01.10-2.H, Effect of Summary Affirmance, is, on its face or in its application here, a denial of due process and equal protection.

## PARTIES TO THE PROCEEDING

The parties to this proceeding are: Wilbur H. Friedman, Jr., an individual, (below, without the "Jr."), the Maryland Insurance Administration and Government Employees Insurance Company (herein GEICO), a wholly owned subsidiary of Berkshire Hathaway.

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## OPINIONS BELOW

The decisions of the Office of Administrative Hearings Administrative Law Judge, the Maryland Insurance Administration (MIA), the Circuit Court for Montgomery County, and the Maryland Court of Special Appeals (CSA) are all unreported. However, the date of the CSA decision appears at http:courts.state.md.us/unreported_opinions.html for May 13, 2008. The Maryland Court of Appeals order denying the petition for certiorari, dated August 25, 2008, is reported at 405 Md. 506 (2008). The November 12, 2008 order denying the motion for reconsideration is apparently unreported. See 406 Md. 443-444 (2008).

## JURISDICTIONAL STATEMENT

The state proceedings are set forth above. As noted, Maryland's Court of Appeals denied a motion for reconsideration on November 12, 2008. This Court has jurisdiction under 28 U.S.C. Sec. 1257(a). The Attorney General of the State of Maryland, by an assistant attorney general, has been a party to this proceeding.

## STATUTES AND REGULATIONS INVOLVED

1. Maryland Rule 1-104, Unreported Opinions:

   (a) Not authority. — An unreported opinion of the Court of Appeals or Court of Special Appeals is neither precedent within the rule of stare decisis nor persuasive authority.

   (b) Citation. — An unreported opinion of either Court may be cited in either Court for any purpose other than as precedent within the rule of stare decisis or as persuasive authority.

In any other court, an unreported opinion of either Court may be cited only (1) when relevant under the doctrine of the law of the case, res judicata or collateral estoppel, (2) in a criminal action or related proceeding involving the same defendant, or (3) in a disciplinary action involving the same respondent. A party who cites an unreported decision shall attach a copy of it to the pleading, brief, or paper in which it is cited.

2. Maryland Insurance Administration Rule, COMAR 31.02.01.10-2.H (Effect of Summary Affirmance):

(1) If the Commissioner issues a final order that summarily affirms the proposed order of an administrative law judge without discussing the facts and legal issues and without expressly adopting the administrative law judge's legal analysis and proposed conclusions of law, neither the final order nor the proposed order is precedent within the meaning of stare decisis.

(2) Notwithstanding Section H(1) of this regulation, a final order of the Commissioner that summarily affirms the proposed order of an administrative law judge without discussing the facts and legal issues and without expressly adopting the administrative law judge's legal analysis and proposed conclusions of law may be cited and relied on in a proceeding before the Commissioner, the Office [of Administrative Hearings] or a court:

(a) When relevant under the doctrine of the law of the case, res judicata, or collateral estoppel; or
(b) In any subsequent disciplinary proceeding involving a party to the final order.

* * *

3. The following statutes are set forth in the Appendix:

- Maryland Insurance Article, Title 27, Subtitle 3, Sections 301; 302 (excerpt); 303 (excerpt); 304 (excerpt); 305 (excerpt); 306 (Appendix CC)
- Maryland Insurance Article, Section 2-210(a)(2) and (c) (Appendix DD)
- Maryland Insurance Article, Section 2-215(a) (excerpt); (c) (excerpt); (h) (Appendix EE)
- Maryland State Government Article, Sections 9-1602, 9-1603, 9-1604, 9-1606 (excerpts) (Appendix FF)
- Maryland State Government Article, Section 10-206(a) (excerpt) (Appendix GG)
- Maryland Corporations and Associations Article, Section 2-414 (Appendix HH)
- 18 U.S.C. Section 1702, Obstruction of correspondence (Appendix II)
- 18 U.S.C. Section 1708, Theft or receipt of stolen property generally (excerpt) (Appendix JJ)

## STATEMENT OF THE CASE

Respondent Government Employees Insurance Company (herein GEICO), insures a car of Mr. Vinh Phuc Nguyen. GEICO's press release dated March 1, 2007 (App. Y, p. 90a), reveals that GEICO has 7 million policy holders. GEICO.COM/ABOUT/CORPORATE/AT-A-GLANCE/, the current website version, reveals that GEICO has 23,000 employees and 12 major offices around the country. GEICO handles Maryland auto claims at its Fredericksburg, Virginia facility. As set forth below, in 2006, the Maryland Insurance Adminis-

tration treated David H. Pushman, a GEICO vice-president, as its point of contact at Fredericksburg. A February 1, 2008, affidavit from GEICO's vice-president Stewart, App. Z, p. 91a, states that Mr. Pushman was in charge of the Fredericksburg office, went on sick leave on June 27, 2006, and did not report to work thereafter.

Nonetheless, the GEICO press release (App. Y, p. 90a) announced that after June 2006, GEICO transferred Mr. Pushman to Washington, D.C. headquarters in a different position and retained him as vice-president, and that he was scheduled to retire sometime after March 1, 2007.

As set forth in the opinion of the Court of Special Appeals (CSA) herein at Appendix C (p. 6a), on May 16, 2006, Petitioner's car was unloading its passengers. Mr. Nguyen's car collided with Petitioner's car, causing property damage for which GEICO, by claims examiner Christinia Krech, refused to pay. On June 23, Petitioner complained to Respondent Maryland Insurance Administration (MIA). Appendix X, p. 88a.

By letter dated July 6, App. W, p. 86a, addressed to vice-president Pushman at GEICO's Fredericksburg location, MIA requested information about the collision. By letter dated July 13, App. V, p. 84a, GEICO's Regional Liability Director Herbert replied that the July 6 letter had been referred to him. The director sent MIA GEICO's computer log and other "pertinent confidential documents." By letter dated July 25, App. U, p. 82a, MIA informed Petitioner, copy to Mr. Herbert, that its administrative investigation has disclosed no violation but that Petitioner enjoyed a right to hearing under Section 2-210 of the Maryland Insurance Article, App.

DD, p. 105a. By letter dated August 14, App. T, p. 80a, Petitioner requested a hearing. It referenced Petitioner's June 23 letter to MIA, in which Petitioner alleged that GEICO had a pattern of refusing to pay claims which, as here, alleged only property damage when, again as here, the witnesses lived out of state and trial was improbable. By letter dated September 20, App. S, p. 78a, addressed to Petitioner and vice-president Pushman, MIA informed them that a hearing would be held. By letter dated October 4, App. R, pp. 76a-77a, MIA informed Petitioner and GEICO — GEICO addressee not given — that it had delegated hearing authority to Maryland's Office of Administrative Hearings (OAH). The letter says:

> Take notice that specific attention at the hearing will be directed to Maryland Code Annotated, Section 27-303.

In the meantime, Petitioner had complained to a Maryland district court that Mr. Nguyen had committed a misdemeanor by reckless driving. At an August 31 hearing, App. Q, pp. 73a-75a, Mr. Nguyen spoke through an interpreter and showed extremely limited English proficiency. The court found that the evidence against Mr. Nguyen did not meet the criminal standard of proof.

State Government Article, Sec. 10-206(a), App. GG, p. 110a, authorizes OAH to make rules governing the procedures in OAH-conducted hearings, and the rules are set forth in Section 28 of the Code of Maryland Regulations (COMAR). By letter dated October 11, App. P. pp. 71a-72a, OAH informed Petitioner that

hearing would be on December 5. It informed him of OAH subpoena rules.[1]

By letters dated November 1 and 6, App. O, pp. 69a-70a, addressed to vice-president Pushman, Petitioner requested, under COMAR Section 28.02.01.10[2] that GEICO produce certain records. John Edmonds, Continuing Claims Supervisor at Fredericksburg, sent a letter dated November 2, App. N, p. 67a, to Petitioner. He acknowledged receipt of Petitioner's request, but declined to produce any of the documents. There was no response to the second request.

---

[1] In relevant part, COMAR 28.02.01.11, Subpoenas, provides:

A. Issuance of Subpoenas: On request of a party, or at the direction of a judge, the Office may issue subpoenas requiring the attendance and testimony of witnesses and the production at the hearing of any tangible item in the possession or under the control of the witness.

* * *

C. Service of subpoenas.

(1) Subpoenas may be served by:

* * *

(b) Certified mail to the person at the address specified in the subpoenas request.

* * *

E. Objections to Subpoenas: A person may object to the subpoena by filing a motion to quash or for other relief.

[2] In relevant part, COMAR 28.02.01.10, Discovery, reads:

A. By written request filed not later than 30 days before a scheduled hearing, a party may require any other party to produce within 15 days, for inspection or copying, any file, memorandum, correspondence, document, object or tangible thing:

(1) Relevant to the subject matter of the case; and

(2) Not privileged.

By letter dated November 6, App. M. pp. 62a-66a, pursuant to OAH COMAR Rule 28.02.01.11, Petitioner requested OAH to serve the following subpoenas: On Mr. Nguyen and GEICO claims examiner Krech, to attend and testify; on vice-President Pushman, to produce tangible items at the hearing. The last sought, in numbered item 7, "All records . . . relating to" the collision of May 16. It also sought records which reveal the organizational structure and the names of the individuals who occupied the positions at the Fredericksburg, Va. claims office on May 25, 2006 and date, names of the custodians of the records, and evidence of the existence of general rules under which GEICO would deny meritorious claims. By registered letters dated November 9, OAH mistakenly served identical subpoenas ad testificandum and duces tecum on Mr. Nguyen, vice-president Pushman, and examiner Krech. GEICO Fredericksburg employee Amy Vandevender signed the receipts for vice-president Pushman and Ms. Krech. Apps. L and K, pp. 56a-61a.

On November 16 and 21, App. J, pp. 53a-55a, GEICO filed its motions for a protective order and to quash the subpoena. It claimed that the documents sought were irrelevant, overly broad, unduly burdensome, and contained requests for privileged information, and that Petitioner was attempting both to litigate his negligence case as well as harass and inconvenience both GEICO and Mr. Nguyen. Finally, GEICO's counsel argued that the sole relevant issue was whether GEICO violated Section 27-303(2).

At the December 5 hearing, App. I, pp. 50a-52a, GEICO elected to bring examiner Krech to testify, but

declined to produce any of the subpoenaed documents. The ALJ asked examiner Krech how she settled claims:

> TR. 39: l. 8: Q: Are you governed by any GEICO procedures or policy letters or anything that tells you one way or another how to settle a claim?
>
> l. 11: A: No, sir.
>
> l. 12: Q: You're free to settle them the way you see them?
>
> l. 14: A: Yes, sir. . . .
>
> l. 17: Q: You review the facts and you make the call?
>
> l. 19: A: Yes, sir.

As noted, Petitioner had subpoenaed records on this issue. At the hearing, he put the same kind of questions to Ms. Krech. She answered that there was no manual governing claims procedures and that she attended no training sessions, other than those required by the State of Delaware, on that subject. App. I, p. 51a. Ms. Krech also said of her conversation with Mr. Nguyen, the insured, TR. 22, line 8 ff.

> I had to listen to him carefully, I did repeat one question, but he came off clear to me. * * * I didn't need a translator when I was talking to him. * * * We had a good communication, I thought.

Both Petitioner and GEICO's counsel had brought translators to the hearing. TR. 5, l. 21. And as noted, at the criminal proceeding Mr. Nguyen showed limited English proficiency.

GEICO moved to quash the subpoena duces tecum on vice-president Pushman on several grounds. One was that he had been replaced by October 2nd and therefore was

no longer at GEICO to get the subpoena. The ALJ agreed, TR 65, l. 7 ff., that the subpoena duces tecum required the physical presence of vice-president Pushman at the hearing, and that inasmuch as he had been replaced due to illness, the service of the subpoena was ineffective.

> No. The subpoena to produce tangible documents at the hearing, so it means he had to come up here with the documents. So even though it's not technically the way you wanted it, in my judgment it's the same thing. So that cures that. He had to be here, right?

At the hearing, the ALJ quashed the subpoena for the statement that Mr. Nguyen had given to GEICO, other records of the collision, and GEICO's manuals and practices. TR. 16, l. 22. He found irrelevant: "what happened at the accident," TR 58, l. 16; and the testimony of Mr. Nguyen, App. I, TR 61, l. 8, p. 52a. The ALJD incorporated into the hearing record only the documents from the MIA investigatory file and one exhibit that GEICO introduced, but none of the documents relating to the information request and the subpoenas.

On December 12, App. H, pp. 48a-49a, Petitioner moved the ALJ to make, in his ALJ decision, certain explicit findings and to state reasons for certain rulings. He also moved the ALJ to make part of the record the information and subpoena requests and motions regarding them.

On December 26, 2006, App. F, pp. 37a-45a, the ALJ issued his proposed decision. It found the testimony of the claims examiner fully credible and that GEICO had performed a reasonable investigation and properly decided that the conduct of Petitioner's passenger was solely responsible for the collision. The ALJD limited the decision to the issue of whether GEICO's conduct

had been arbitrary or capricious, and said that that test is confined to the test of whether the decision is supported by substantial evidence. The ALJD makes no reference to Ms. Krech's testimony that she is not subject to instructions on how to resolve claims. The ALJD denied Petitioner's post-hearing motions as untimely. It relied on COMAR Section 28.02.01.16.B(1), which reads, in its entirety, "A party may move for appropriate relief before or during a hearing."

When Petitioner got his copy of the transcript, he filed a motion to correct errors in transcript, a first alternative motion to remand to ALJ to correct errors, and a second alternative motion to adopt other just and proper procedure to correct errors in transcript.

Petitioner also filed timely exceptions and a supporting brief. App. G, pp. 46a-47a. He argued that the following ALJD rulings were all error:

(1) Vice-president Pushman's incapacity made the subpoena a nullity; (2, 3, 9, 10) The records Petitioner sought, the testimony of Mr. Nguyen, the transcript of the related criminal proceeding, and the content of an offer of proof were all irrelevant; (4) Title 27 subtitle 3, App. CC, pp. 102a-104a, of the Insurance Article

> did not create an adjudicatory process to allow claimants to dispute liability in accidents; liability disputes properly belong in the constitutional courts.

(5) The terms "arbitrary" and "capricious," as used in Section 27-303(2) are narrower than the well established judicial definition; (6) The ALJ's findings of fact were supported by the credible evidence; (7) The ALJ properly failed to incorporate the documents relating to the

discovery and subpoenas; (8) Petitioner's motions made after the record was closed were untimely; and (11) the adverse inference rule was inapplicable. Petitioner also argued that by placing impermissible burdens on the exercise by Petitioner of his statutory right, the ALJ committed a constitutional tort.

On February 5, 2007, App. E, pp. 27a-36a, MIA affirmed the ALJD. It ruled: The only issue before the ALJ was whether GEICO had violated Section 27-303(2) of the Insurance Article (pp. 29a-30a); MIA did not enjoy the power to correct or to cause the correction of errors in the transcript. Petitioner was litigating his dispute in the wrong forum; The subpoena was not properly served on Mr. Pushman;

> Complainant did not address his subpoena to a records custodian or a corporate officer, but rather to an individual. * * * What Complainant fails to recognize is that even if the subpoena had been served, it would have been quashed as being oppressive, burdensome, and a request for irrelevant documents.

The information requested in numbered item 7, and all records relating to the collision, were made available at the hearing;[3] Petitioner's assertion that claims examiner Krech committed perjury was scurrilous; The testimony of Mr. Nguyen could not possibly bear on the issue before the ALJ; Petitioner must prove that arbitrary and capricious actions "were directed specifically to him";

---

[3]However, as MIA's brief in the Court of Special Appeals notes, p. 12, GEICO took a recorded statement from Mr. Nguyen. GEICO never produced it.

Petitioner was not entitled to have the prehearing pleadings made part of the record, but the issue is moot because they had already been made part of it; The ALJ properly ruled that the evidence Petitioner sought to introduce was irrelevant; And finally that this decision is not stare decisis, as

> A Recommended Decision summarily affirmed under COMAR 31.02.02.10-2.H is not precedent within the meaning of stare decisis in other cases.

On February 23, 2007, Petitioner filed an appeal with the Circuit Court for Montgomery County. By order dated June 18, App. D, p. 26a, that court affirmed MIA. Petitioner says nothing else about that proceeding because under well settled Maryland law, appellate courts review the decision of the agency and not that of the circuit court: E.g., *Mehrling v. Nationwide Ins. Company*, 371 Md. 40, 57, 806 A.2d 662 (2002).

On July 13, 2007, Petitioner appealed to the Court of Special Appeals (CSA). Thereafter, in his main brief, he argued, pp. 1-2, that:

> 1. COMAR rule 31.02.01.10-2.H (Effect of Summary Affirmance) is invalid on its face as (1.1) beyond the power of the Maryland Insurance Administration (MIA) to make, (1.2) arbitrary and/or capricious, and (1.3) a denial of due process and/or equal protection;
>
> 2. MIA, to the prejudice of Complainant, departed from its own rule by failing to make its decision herein one with precedential effect;
>
> 3. MIA has implemented a conclusive presumption, one in direct conflict with the statutory commands of Sections 27-301 ff. of the Insurance Article and Section 17-103(b)(2) of the Transportation Article;

> 4. MIA implemented its conclusive presumption above by refusing to discredit a witness, the GEICO claims agent, and by ruling irrelevant evidence as would further discredit her;
>
> 5. MIA improperly made findings of fact and conclusions of law based on an unlawful and unconstitutional procedure;
>
> 6. MIA improperly disclaimed power both to correct errors in the transcript and to remand the case to OAH for the ALJ to make the corrections;
>
> 7. MIA found improper the service of a subpoena on a vice-president of GEICO.[4]

On May 14, 2008, App. C, pp. 3a-25a, CSA issued an unreported opinion. It there said that: Petitioner was "abusing the judicial process and dissipating judicial resources" by pursuing his appeal; The standard of review consists of the substantial evidence and error of law tests; "Administrative agencies are entitled to deference as to their interpretation of statutes they are charged with administering"; Petitioner had waived reliance on other sections of Section 27-301 ff.; MIA had properly adopted a narrow definition of the terms "arbitrary" and "capricious": and, p. 19a,

> Evidently, appellant expected the ALJ and MIA to conduct a trial and to assess the credibility of the witnesses. It is beyond the authority of these administrative bodies to adjudicate tort claims and to award monetary damages under an administrative action initiated for the purpose of determining the reasonableness of an insurance company's actions. These fora were not proper for the type of redress sought by appellant.

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[4]Petitioner should have said: MIA improperly found improper . . .

CSA also ruled as follows:

The ALJ properly excluded evidence as irrelevant; Ms. Krech did not commit perjury; "GEICO's dealing with other customers was not the issue"; The issue was whether Petitioner "was contributorily negligent"; The ALJ properly refused to consider Petitioner's post-hearing motions as untimely; The subpoena on vice-president Pushman was not properly served; and, p. 25a, that "There is no right to a decision that has prospective effect."

Petitioner filed a petition for certiorari with the Maryland Court of Appeals. The issues he presented there were:

> 1. Whether MIA has subverted the legislative intent by implementing evidentiary and other rules which make it impossible to prove that insurance companies violate Section 27-301 ff. of the Insurance Article; and
>
> 2. Whether COMAR Rule 31.02.01.10-2.H (Effect of Summary Affirmance) is invalid on its face as beyond the power of MIA to make, arbitrary and/or capricious, and/or a denial of due process and/or equal protection.

The petition argued, p. 16, that CSA erred in providing a justification for MIA's action. It disputed CSA's ruling that there is no right to a decision that has stare decisis precedential effect. At p. 21, Petitioner said that he "respectfully submits that due process requires more of the CSA."

On August 25, 2008, App. B, p. 2a, the Court denied the petition.

On September 19, 2008, Petitioner filed a timely motion for reconsideration, which argued:

> II. By its denial of certiorari, this Court is tolerating gross violations of equal protection.
>
> * * *
>
> III. By its denial of certiorari, this Court is permitting the maintenance and implementation by Special Appeals and MIA of a secret law. This court should use this case as a vehicle to replace Rule 1-104 with Federal Rule [of Appellate Procedure] 31.2.
>
> * * *
>
> IV. By its denial of certiorari, this court has tolerated a number of gross violations of due process.

On November 12, 2008, App. A, p. 1a, the court denied the motion for reconsideration.

Insurance Article Title 27 Subtitle 3, App. CC, pp. 102a-104a, is entitled "Unfair Claim Settlement Practices." 301(a) recites the intent of the subtitle: to provide an additional administrative remedy for claimants. 302 provides that it applies to all insurance policies issued in Maryland. 303 outlines unfair claim settlement practices. They include: (1) misrepresentation of pertinent facts or policy provisions that relate to the claim at issue; (2) refusal to pay a claim for an arbitrary or capricious reason based on all available information; and (6) failure to provide promptly on request a reasonable explanation of the basis for denial of a claim. 27-304 outlines unlawful general practices; the equivalents of 303(1), (2) and (6) are Sections 304(1), (15) and (14). Section 27-305 sets forth penalties, which are much higher for unlawful general practices.

At all times, Petitioner has contended that GEICO's insured was responsible for the collision and that GEICO gave a false reason for its denial of the claim. Petitioner sought by his discovery request, subpoena, and his attempted examination of the GEICO claims examiner to determine what facts GEICO had at the time it denied the claim, and that the decision to deny was motivated by other reasons, particularly that GEICO's actions towards him were part of a pattern — denials of small claims for property danage when the witnesses resided in other states and were unlikely to appear in court — and not directed solely to him. Thus Petitioner was claiming that GEICO violated Sections 27-303(1), (2) and (6) and their Section 304 counterparts.

## DEPARTURES FROM ESTABLISHED PRECEDENT

Below, Petitioner will show — by the following eleven numbered items — that CSA, MIA, and OAH made rulings herein that clearly would not have been made in reported decisions with precedential stare decisis effect. Some would not have been made in reported decisions because they depart from one or more established Maryland rules; others would not have been made in reported decisions because they would embarrass the judicial system and the institutions of government. Petitioner raised all of these issues to the CSA, except for CSA's having supplied reasons for the conduct of MIA; and that he brought to the attention of Maryland's Court of Appeals.

1. As to the ruling that Petitioner was not entitled to introduce evidence and to cross-examine, first, the stated legislative intent of Sections 27-301 ff. is to give claim-

ants an additional remedy for unfair settlement claims practices. And:

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature . . . . [I]f the plain language of the statute is unambiguous and consistent with the statute's apparent purpose, we give effect to the statute as it is written.[5]

Here the statement of legislative intent and language of the statute are clear. But ALJ and MIA made it difficult, if not impossible, to establish a violation of Section 27-301 ff.

Second, the general rule as to cross examination, as stated in *Hill v. Wilson*, 134 Md. App. 472, 480, 760 A.2d 294 (2000), is:

> A witness generally may be cross-examined on any matter relevant to the issues, and the witness's credibility is always relevant . . .

But here CSA said that Petitioner was not entitled to assess the credibility of the witnesses. In addition, in a reported decision, unlike here, a court would avoid constitutional issues. But here the denial of cross examination also implicates due process; this Court has said:

> Indeed, the due process clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.[6]

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[5] *Oakland v. Mountain Lake Park*, 392 Md. 301, 316, 896 A.2d 1036 (2006); *Motor Vehicle Administration v. Shepard*, 399 Md. 241, 254, 923 A.2d 100 (2007); *Chow v. State*, 393 Md. 431, 443, 903 A.2d 388 (2006) (same, but "statutory interpretation").

[6] *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 (1974), rehearing denied 420 U.S. 956.

As noted, Petitioner also argued that the denial of cross examination in substance created a conclusive presumption. In *Vlandis v. Klein*, 412 U.S. 441, 446 (1973), this Court said:

> Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments.

Third, the *Burlington Truck* administrative law rules that a

> reviewing court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency . . . . The courts may not accept appellate counsel's post hoc rationalizations for agency action . . .[7]

are settled law in Maryland. MIA and the ALJ had ruled piecemeal that various evidence Petitioner sought to introduce was all irrelevant. They gave no reason why. But CSA supplied a general (albeit not a felicitous) reason why, that this type of administrative proceeding is not the kind of proceeding in which a complainant is entitled to have MIA assess the credibility of the witnesses.

2. As to MIA's limitation of the complaint to a violation of Section 27-303(2), Insurance Article Section 2-210(a)(2), App. DD, p. 105a, provides that the Maryland Insurance Commissioner shall hold a hearing on

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[7] *United Steelworkers v. Bethlehem Steel*, 298 Md. 665, 679, 472 A.2d 62 (1984), citing *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 167-168 (1962); *Brodie v. Motor Vehicle Administration of Maryland*, 367 Md. 1, 3-4, 785 A.2d 747 (2001); *Mehrling*, above, p. 65; *Bereano v. State Ethics Commission*, 403 Md. 716, 743, 944 A.2d 538 (2008).

written demand by any person aggrieved by an action of the Commissioner. There is nothing in the statute that limits the hearing to Section 27-303(2) and MIA's order directing a hearing said only that specific attention would be devoted to Section 27-303. The investigator, Appendix U, p. 83a, and GEICO's counsel, Appendix J, p. 53a, sought to limit the litigation to 303(2). That ALJ agreed and ruled irrelevant evidence that would show violations of other sections of Sec. 27-303 and 304, namely that GEICO's explanation of its action was false, and that GEICO misrepresented the facts. CSA ultimately ruled that Petitioner waived reliance on any other part of Section 27-301 ff. and was confined to litigating Section 27-303(2). Petitioner continued to argue that the rejected evidence should have been admitted.

On these facts, the substantial evidence rule bars the conclusion that one who claims that the rejection of evidence was error somehow waives the argument which the evidence would support. The substantial evidence rule requires a finding that the only waiver that may even arguably be attributable to Petitioner was his failure to move to strike representations of GEICO's counsel that vice-president Pushman was on sick leave; OAH treated these representations as evidence.

3. Rulings in published decisions that tolerate obvious perjury violate the substantial evidence rule; they would also embarrass the judiciary. But here MIA and CSA denied that examiner Krech committed perjury

by her statements that there were no manuals nor procedure letters nor training sessions instructing her how to resolve claims. In addition, as MIA would have received into evidence the transcript of the criminal proceeding, it would have found that Mr. Nguyen had limited English proficiency and that Ms. Krech's statement that she and he had "good communication" was also perjury.

4. As to the burdensomeness of the subpoenas, there is no Maryland rule that if a subpoena seeks too much, the one who subpoenas it is entitled to nothing. On the contrary, *Blades v. Swords*, 107 Md.App. 178, 182-183, 667 A.2d 917 (Md.App. 1995), said: "The discovery rules are broad and comprehensive and should be liberally construed." *Blades* was cited with approval in *Ehrlich v. Grove*, 396 Md. 550, 560, 914 A.2d 783 (2007). In addition, in *Tanis v. Crocker*, 110 Md.App. 559, 575, 678 A.2d 88 (1996), the court found that the lower court abused its discretion in issuing a protective order. The court followed Rule 16(c) of Federal Rules of Civil Procedure: the party seeking the protective order has the burden of making a particular and specific demonstration of fact, as distinguished from general, conclusory statements, revealing some injustice, prejudice, or consequential harm that will result if protection is denied. Here, however, GEICO did not make the demonstration required by *Tanis*, and yet ALJ, MIA and CSA ruled that Petitioner's subpoena duces tecum should be quashed in its entirety because it was burdensome.

5. As to the departure from Fredericksburg of vice-president Pushman, under Sec. 2-414(b) of the Corporations and Associations Article, App. HH, p. 111a, a third party's rights are not affected by changes in an agent's duties unless he had knowledge of the company bylaw or resolution changing them. As to the validity of the service of the subpoena on vice-president Pushman, Petitioner restates the facts: Vice-president Pushman ceased working in June 2006, but continued on as a vice-president. MIA served letters dated July 6 and September 20 on him. Petitioner served a discovery request dated November 1 on him. GEICO treated all these as communications with the corporation. OAH served the subpoena on vice-president Pushman on November 13. MIA said:

> Complainant did not address his subpoena to a records custodian or a corporate officer, but rather to an individual.

But Petitioner did not know that vice-president Pushman had been replaced until GEICO's counsel served the motions to quash the subpoena. The statement that the subpoena was not addressed to a corporate officer does not pass the substantial evidence test.

In addition, the subpoena was issued under OAH and not MIA rules. And under Maryland law, OAH is a separate administrative agency. Thus the State Government Article provides, Sec. 9-1602 ff. and 10-206(a), App. FF, GG. pp. 108a-110a, that OAH is an independent agency, headed by a Chief ALJ, a political appointee. He is empowered and directed to develop rules and procedures and those rules govern OAH hearings. A reported ruling here that OAH's subpoena powers were ineffective would undermine OAH procedures and thereby embar-

rass OAH. There is no Maryland rule that grants deference to the construction of one agency's rule by either its own ALJ or by another agency. In a reported decision, CSA would not have found deference to be warranted.

6. As to the timeliness of a motion after the close of the hearing but before the ALJD issued, in *Simon Moskowitz v. Maryland Department of the Environment*, OAH No. MDE-LHD-055-06-48463, May 18, 2007, App. AA, p. 93a, which Petitioner cited in his main brief to CSA, an OAH ALJ granted a motion to reopen a closed hearing for the introduction of more evidence. Again, COMAR 28.02.01.08.B(8) empowers ALJs to "Request parties to submit legal memoranda, proposed findings of fact, and conclusions of law." By implication, ALJs enjoy authority to consider post-hearing motions to extend time for filing documents. Moreover, Sec. 28.02.01.16.B(1) says nothing about motions between the close of the hearing and the date the ALJ files his decision. In addition, as shown below, ALJs, MIA and reviewing courts all enjoy the power to cause the correction of the record. But the ALJ ruled that under 16.B(1) post hearing motions were untimely.

As to MIA, COMAR Sec. 31.02.01.10-2.D, Final Order Following Proposed Decision, relates to cases where, as here, MIA has delegated authority to OAH to make a proposed decision. It reads:

> Types of Action by the Commissioner. The Commissioner may affirm, reverse, or modify the proposed findings of fact, proposed conclusions of law, or proposed order, or remand the case to the Office for further proceedings by setting forth, with particularity, the basis for the Commissioner's reversal, modification, or remand.

But this clearly empowers MIA to remand to correct the record. As to CSA, under Sec. 2-215(h) of the Insurance Article, App. EE, p. 106a, a court can require the agency to take additional evidence. As to all three, and in any event, in *In re Timothy C.*, 376 Md. 414, 429-431, 829 A.2d 1024 (2003) n. 10, the court cited with favor to cases from other jurisdictions, including *Helle v. Public Utilities Commission of Ohio*, 110 Ohio St. 434, 439, 161 N.E. 282 (1928), for the proposition that the trial court has an inherent power to amend the record to "make the record speak the truth." *Helle* involved an administrative agency involved in a quasi-judicial function. Therefore, so far as the Court of Appeals is concerned, courts and administrative bodies enjoy the same power to cause corrections.

None of this is recondite. The Maryland rule goes back at least 210 years: *Maryland Ice Co. v. Arctic Ice-Mach. Manuf'g Co.*, 30 A. 633, 635 (1894); *Duvall v. Wells*, 4 H. & MH. 114 (1798). Thirty years earlier, Blackstone said in his *Commentaries on the Laws of England, Proceedings in the nature of Appeals, Book the Third, Chapter the Twenty-Fifth*, p. 406 (Yale Avalon Project on the Internet):

> But now, the courts are become more liberal; and, where justice requires it, will allow of amendments at any time while the suit is pending.

In sum, ALJ, MIA, and CSA all clearly enjoy the power to cause the correction of mistakes in the record. Here all claimed that they did not. But Maryland follows

> the elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them.[8]

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[8] *International Union (UAW) v. N.L.R.B.*, 459 F.2d 1329, 1341 (D.C. Cir. 1972) (Skelly Wright, J.).

> An agency changing its course must supply a reasoned analysis indicating that prior policies are being deliberately changed, not casually ignored. . .[9]

Finally, and as noted, Maryland follows the rule the reviewing court cannot sustain an agency order except for the reasons stated by the agency. But here the reasons given by ALJ and MIA were faulty.

7. Section 2-215(h) of the Insurance Article, App. EE, pp. 106a-107a, which controls, prescribes six different standards of judicial review: (i) "violate constitutional provisions"; (iii) "are made by unlawful procedure"; and (iv) "are affected by other error of law." Petitioner relied on these, but CSA considered only the substantial evidence and error of law tests.

8. The terms "arbitrary" and "capricious" may fairly be said to have plain, albeit not yet perfectly defined, meanings. Thus, for example, in *Harvey v. Marshall*, 389 Md. 243, 302-304, 884 A.2d 1171 (2005), the court said that an agency decision may be arbitrary or capricious if it is:

> contrary to or inconsistent with the enabling statute's language or policy goals . . . . if it is irrationally inconsistent with previous agency decisions. . . . if similarly situated individuals are treated differently without a rational basis for such deviation.

Where words have a plain meaning, Maryland courts give effect to that meaning. *Motor Vehicle Administration v. Jones*, 380 Md. 164, 175-176, 844 A.2d 388 (2004). But here, CSA deferred to MIA's far narrower definition of the terms, as used in Sec. 27-303(2) and 27-304(15).

9. As to CSA's ruling that MIA has a general power to opt that its decisions will not have precedential effect,

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[9] *Christopher v. Department of Health*, 381 Md. 188, 209, 215, 849 A.2d 40 (2004).

the facts are as follows: MIA had asserted a right under COMAR rule 31.02.01.10-2.H (Effect of Summary Affirmance) to make its decision nonprecedential. But, by its terms, 10-2.H operates only when MIA does not discuss the facts and law. Petitioner argued to CSA that MIA did discuss facts and law. MIA counsel so admitted, brief p. 23. Thus MIA's reliance on 10-2.H was error. CSA did not rely on 10.2.H. It ruled that there is no right to a precedential decision; otherwise put, that MIA enjoys a general power to render a nonprecedential decision any time it pleases.

As noted, in Maryland, *Burlington Truck* bars a reviewing court from upholding an agency order unless the order is sustainable on the agency's findings and for the reasons stated by the agency. But CSA supplied reasons for the conduct of the agency.

More importantly, *Mehrling*, pp. 64-65 requires administrative agencies to make meaningful findings of fact and to state reasons when rendering final decisions. Thus MIA enjoys the power (a) to make findings of fact and state reasons (b) to adopt the findings and reasons from the ALJD, and (c) to adopt some and make others. Under 10-2.H as written, all of these would have stare decisis effect. But 10-2.H claims a new power (d): to make decisions in which MIA neither expressly adopts the ALJ's legal analysis nor makes its own legal analysis. Rule 10-2.H purports to authorize MIA to decide cases without making the meaningful findings of fact and without stating reasons required under *Mehrling*.

Third, Maryland has a general rule, *Motor Vehicle Administration v. Shepard*, above, 399 Md. p. 254, that

> We should avoid a construction of the statute that is unreasonable, illogical, or inconsistent with common sense.

Statutes should be read so that no sentence is rendered "surplusage, superfluous, meaningless, or nugatory." *Ibid.* The same principles that govern the interpretation of statutes govern the interpretation of agency rules and regulations. *Christopher v. Department of Health,* above, 381 Md. p. 209. But the existence of a general power to make nonprecedential decisions renders 10-2.H if nothing else surplusage.

10. Long ago, in *Summers v. Mosely*, 2 Cr. & M. 477, 149 Eng. Rep. 849 (1834), the court found that a subpoena duces tecum did not require the presence in the forum of the person to whom it was addressed. This Court agreed: *Wilson v. U.S.*, 221 U.S. 361, 373-374 (1911); *Essgee Co. v. U.S.*, 262 U.S. 151 (1923). This issue has never been raised in reported Maryland decisions. But, as noted, the ALJ found that a subpoena duces tecum requires the appearance in the forum of the individual to whom it was addressed, and further that his inability to be present excused the Company's nonproduction of the subpoenaed items.

11. Despite the *Burlington Truck* rule GEICO's counsel said, brief to CSA p. 8, of the certified mail return receipts for the subpoenas addressed to Ms. Krech and GEICO vice-president Pushman,

> They were not signed for by either Ms. Krech or Mr. Pushman as required regulation and as such, neither Ms. Krech nor Mr. Pushman were properly served with a subpoena. [sic]

CSA agreed with MIA that the Pushman subpoena was improperly served, but gave no reason. It did not invoke *Burlington Truck* as against GEICO. The service would be improper if, and only if, Ms. Vandevender lacked authority to receive the subpoena. But by accepting and signing for the document, Ms. Vandevender had knowingly and falsely represented to the mail deliverer that she had such authority. GEICO has thereby accused its own employee of a violation of 18 U.S.C. Sec. 1702 and 1708, App. II and JJ, pp. 112a-114a, which subject to fine and imprisonment whoever takes mail from a mail deliverer with knowledge that the person lacks authority to do so. See, e.g., *U.S. v. Palmer*, 864 F.2d 524, 526 (7th Cir. 1988), *cert. denied*, 490 U.S. 1110. CSA agreed with GEICO.

## REASONS FOR GRANTING THE PETITION

Initially, Petitioner submits the table of authorities of his main brief to the CSA, App. BB, pp. 97a-101a, to assist this Court in assessing CSA's statement that Petitioner argued "without reference to any authority and without any factual basis to support his allegations." More broadly, he understands CSA's disparagement of his arguments as a statement that CSA regards him as a disfavored litigant.

Judicial rules that unreported decisions cannot be cited as either precedent or persuasive authority discourage the public from wasting its time by reading those decisions. As shown here, the rules allow for a judicial practice of creating bodies of law, diametric departures from reported rules of decision. It may fairly be said that those departures are functionally equivalent to a secret law, to be applied to disfavored

litigants. It is inconceivable that Petitioner is the only disfavored litigant in Maryland, or in the United States. Instead, this case differs from many others only in that here at all stages, Petitioner demonstrated the departures at the previous level, and he thereby occasioned an administrative and judicial response: still further departures from precedent.

By its creation of FRAP Rule 32.1, this Court has shown awareness that there exists a judicial practice of unreported rules of decision. The magnitude of the practice will only become known when the legal community — scholars, law schools, and bar associations — begin to scrutinize the unreported decisions in Maryland and other states. By granting certiorari here, and airing CSA's practices, this Court will engender an interest in the legal community and hasten the examination of unreported decisions in all states. That examination will help bring the practices complained of here to an end. Thus this case is an ideal vehicle for advancing the principles of equal protection, fairness, and predictability.

This Court has granted review where little money is involved, *Thompson v. City of Louisville*, 362 U.S. 199 (1960), and where the underlying merits are unclear, *Peralta v. Heights Medical Center*, 485 U.S. 80, 86-87 (1988).

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court to grant the writ of certiorari herein to the unreported opinion of the Maryland Court of Special Appeals.

Respectfully submitted,

WILBUR H. FRIEDMAN, JR.
16303 Spring Water Court
Rockville, MD. 20853-3210
(301) 260-8283
*Petitioner Pro Se.*